Supreme Court, U.S.
FILED
JAN 19 1994

No. 93-1191

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JEFFREY JAY EZZELL,

Petitioner,

v.

NEW HAMPSHIRE INSURANCE COMPANY,
a foreign corporation,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

ROBERT A. CLIFFORD
Counsel of Record
KEITH A. HEBEISEN
Two North LaSalle Street
Suite 700
Chicago, Illinois 60602
(312) 899-9090

DAVID A. NOVOSELSKY
KEVIN S. BESETZNY
120 North LaSalle Street
Suite 1400
Chicago, Illinois 60602
(312) 346-8930

Attorneys for Petitioner

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

50 pp

QUESTION PRESENTED

Whether the District Court and the Sixth Circuit correctly interpreted and applied the proper summary judgment standard.

PARTIES TO THE PROCEEDINGS

Petitioner, Jeffrey J. Ezzell, states that he was the defendant before the United States District Court for the Western District of Michigan and appellant before the United States Court of Appeals for the Sixth Circuit.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISION INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	5
CONCLUSION	13
APPENDIX	infra

TABLE OF AUTHORITIES

Cases PAGE

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 10, 11, 12, 13

Arco v. Travelers' Ins. Co., 730 F.Supp. 59 (W.D. Mich. 1989) 6

Babbitt v. State of Michigan, 778 F.Supp. 941 (W.D. Mich. 1991) 6

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) .. 11, 13

Jones v. General Motors Corp., 939 F.2d 380 (6th Cir. 1991) 5, 9

Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986) 11, 13

Sanford Street Local Development First Corp. v. Textron, Inc., 768 F.Supp. 1218 (W.D. Mich. 1991) 6

Street v. J.C. Bradford & Co., 886 F.2d 1472 (6th Cir. 1989) 5, 9, 10, 11, 12

Statute

Rule 56, F.R.C.P. 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JEFFREY JAY EZZELL,

Petitioner,

v.

NEW HAMPSHIRE INSURANCE COMPANY,
a foreign corporation,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Jeffrey J. Ezzell petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (App., infra 1) is reported at 7 F.3d 234 (6th Cir. 1993), Unpublished Disposition (1993 W.L. 340064 (6th Cir. (Mich.))). The ruling of the United States District Court for the Western District of Michigan (App., infra 12) is reported at 1992 W.L. 71385 (W.D. Mich.), Not Published in F.Supp.. The order of the U.S. Court of Appeals

for the Sixth Circuit on petitioner's Petition for Rehearing and Suggestion, in the Alternative, for Rehearing *En Banc* is not reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on September 7, 1993. A petition for rehearing and suggestion, in the alternative, of rehearing *en banc* was denied on October 21, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254.

STATUTORY PROVISION INVOLVED

Rule 56, F.R.C.P.:

> "(c) **Motion and Proceedings Thereon**. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

STATEMENT OF THE CASE

On November 22, 1989, plaintiff, the New Hampshire Insurance Company, filed a complaint for declaratory judgment seeking to reform a policy of insurance, Policy No. BA 498-50-85, policy period May 1, 1987 to May 1, 1988, correcting a mistake allegedly made when the policy was issued, and replacing the symbol "2" under liability coverage on the declarations page with the symbol "7" consistent with the intent of the parties and the consideration paid upon issuance of the policy. That cause was dismissed for lack of case or controversy. The present action was filed on August 31, 1990. On October 29, 1991, plaintiff filed a second amended complaint for declaratory judgment. On December 4, 1991, defendant, Jeffrey Jay Ezzell, filed his answer and affirmative defenses to the second amended complaint.

On July 12, 1991, plaintiff filed its motion for summary judgment and brief in support seeking reformation of the subject policy to reflect that liability coverage thereunder was provided to the insured for only those vehicles specifically designated or scheduled in said policy. Specifically, plaintiff sought reformation of the liability coverage designation in the subject policy from the symbol "2" (indicating all owned autos) to the symbol "7" (indicating only specifically described autos). Additionally, plaintiff sought a declaration that it had no duty to defend or indemnify the insured for any losses sustained by Jeffrey Jay Ezzell in an underlying personal injury action brought by Ezzell against the insured and one of its employees.

In response, defendants filed a joint cross-motion for summary judgment seeking a declaration that plaintiff had a duty to defend and indemnify the insured and its em-

ployee, George Wilder, in the personal injury action brought by Ezzell against them in the Circuit Court of Cook County, Illinois.

On March 24, 1992, the District Court, the Honorable Benjamin F. Gibson, entered an order granting plaintiff's motion for summary judgment and reforming the subject policy to replace the liability symbol "2" with the liability symbol "7". Further, the District Court denied defendants' joint cross-motion and ordered that all other pending motions were denied as moot.

On April 16, 1992, defendant, Jeffrey Jay Ezzell filed a timely Notice of Appeal. On September 7, 1993, the United States District Court of Appeals for the Sixth Circuit issued its opinion affirming the District Court. On October 21, 1993, the Sixth Circuit denied the Petition for Rehearing and Suggestion, in the Alternative, for Rehearing *En Banc*.

The Sixth Circuit had jurisdiction over this appeal pursuant to U.S.C. §1291. Plaintiff, the New Hampshire Insurance Company, is a corporation incorporated in the state of New Hampshire, with its principal place of business in Manchester, New Hampshire. Defendant, the Michigan Mutual Insurance Company, is a corporation incorporated in the state of Michigan, with its principal place of business in Detroit, Michigan. Defendant, A. Luurtsema Truck Lines, Inc. is a corporation incorporated in the state of Michigan with its principal place of business in Hudsonville, Michigan. Defendant, George Wilder, was at all times relevant a resident of Michigan. Defendant, Jeffrey Jay Ezzell, is a resident of Illinois. The jurisdiction of the District Court was founded upon diversity of citizenship pursuant to 28 U.S.C. §1332. The amount in controversy was alleged to be in excess of fifty thousand ($50,000.00) dollars.

REASONS FOR GRANTING THE PETITION

The decisions of the District Court and the Sixth Circuit, while based upon an interpretation of a procedural rule, have had a dramatic impact upon petitioner's (and all litigants') right to have a trial on the merits of his claim.

The decision of the Sixth Circuit is in conflict with the prior decisions of that court which it relied upon (*Jones v. General Motors Corp.*, 939 F.2d 380 (6th Cir. 1991); and *Street v. J.C. Bradford & Co.*, 886 F.2d 1472 (6th Cir. 1989) as well as the decisions of this Court which the Sixth Circuit relied upon in establishing a "new era" for summary judgments. Petitioner believes that the courts below misapprehended certain facts regarding this case, and that the Sixth Circuit misapprehended the manner in which the District Court resolved this case—a decision which petitioner respectfully submits was improperly based upon the weighing of credibility of various witnesses who did not appear before the court, as well as by disregarding certain evidence which established far more than a reasonable basis to deny summary judgment for plaintiff.

In its Opinion, the Sixth Circuit held that summary judgment is proper where:

> "There is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law."

The citation to Federal Rule of Civil Procedure 56(c) is accurate, correct and not disputed. Its interpretation, however, is disputed by petitioner.

Summary judgment is proper only where there are no genuine issues as to any material fact *and* the moving party is entitled to judgment as a matter of law. (*Arco v. Travelers' Ins. Co.*, 730 F.Supp. 59 (W.D. Mich. 1989); *Babbitt v. State of Michigan*, 778 F.Supp. 941 (W.D. Mich. 1991).) When considering a Motion for Summary Judgment, a court is required to draw all inferences from the underlying facts in a light most favorable to the party opposing the motion. (*Babbitt*, 778 F.Supp. at 946.) There is no material issue of fact for trial unless, in viewing the evidence in favor of the non-moving party, a reasonable fact finder could return a verdict for that party. (*Sanford Street Local Development First Corp. v. Textron, Inc.*, 768 F.Supp. 1218 (W.D. Mich. 1991).) When considering a motion for summary judgment, a District Court cannot try issues of fact, but is empowered only to determine whether there are issues to be tried. (*Arco*, 730 F.Supp. at 62.)

Petitioner herein questions how the courts below treated the matters raised in opposition to New Hampshire Insurance Company's Motion for Summary Judgment as well as the Sixth Circuit's interpretation of the "new era" of summary judgment arising from decisions of that court and this Court since 1986.

This dispute arose as a result of an insurance policy issued by New Hampshire Insurance Company ("NHIC") to A. Luurtsema Truck Lines, Inc. ("Luurtsema") and the question of coverage for a tractor-trailer accident involving Jeffrey Jay Ezzell. As the Sixth Circuit correctly notes, Jeffrey Jay Ezzell was severely injured on September 29, 1987, when the Luurtsema tractor-trailer in which he was riding fell from a 30 foot overpass on the Stevenson Expressway near Chicago, Illinois. Luurtsema sought indemnity from NHIC.

A policy was issued by NHIC to Luurtsema which, on its face, appeared to provide coverage for the tractor-trailer in question. This policy was renewed by NHIC for two years subsequent to its original issuance. The scope of its coverage was not questioned by NHIC until after a claim for coverage was made following the tractor-trailer accident in Chicago, Illinois in which petitioner was injured. Luurtsema had applied for insurance coverage through one of its employees responsible for insurance matters, John Stamm. Mr. Stamm approached Douglas McColl, an "independent insurance agent" for quotations for coverage and eventually "obtained for Luurtsema a business auto policy from NHIC with a $1 million liability coverage limit."

The Sixth Circuit correctly noted that:

> "The parties' intent in entering into this contract, and the policy's terms, are at the center of this dispute. Luurtsema, [its primary insurance carrier, MMIC] and Ezzell contend that the policy Stamm sought from NHIC, through the [independent insurance agency], was to provide additional coverage for Luurtsema's tractor-trailers. NHIC, in contrast, contends that the parties' intent was to establish a policy covering only Luurtsema's passenger automobiles and light trucks."

While the Sixth Circuit accurately sets forth the basic disputes between the parties and the evidence advanced by NHIC, considering the affirmative evidence offered by petitioner and the other defendants in support of their position, it is respectfully urged that a significant misapprehension of fact occurred which was exacerbated by an inappropriate application of the so-called "new era" doctrine of summary judgments.

Summary judgment was presented in a somewhat unusual fashion. Before discovery was completed, and before the deposition of John Stamm (a critical witness) was completed, NHIC moved for summary judgment. Since the Stamm deposition had not yet been completed, defendants produced an affidavit from John Stamm which formed one (but not all) of the critical support for their position that summary judgment was not appropriate in favor of NHIC but, instead, should have been awarded to defendants.

The Stamm affidavit covered areas which were not covered in the portion of the deposition which had been completed prior to the time NHIC filed its motion for summary judgment. The Stamm affidavit established the fact that Luurtsema did intend to obtain coverage for its tractor-trailers through the NHIC policy and, further, that it had relied upon the NHIC policy to provide it with coverage based upon the issuance and renewal of this policy for several years.

However, the Sixth Circuit rejected the Stamm affidavit as providing nothing more than a "mere discrepancy between opponents". This "discrepancy" was one which it found insufficient to "take an issue to the trier of fact." Further, it was noted that the Stamm affidavit, even though it admittedly "contradicted earlier evidence obtained from Stamm during discovery, was insufficient to raise a 'genuine issue as to any material fact,' " relating to the "parties' intent".

Petitioner respectfully maintains that it was a misapprehension of fact which led to the erroneous application of law. The Stamm affidavit was *not* submitted to "contradict" earlier deposition testimony taken from this same witness. Instead, the affidavit covered specific issues which were *not* covered in the deposition as it proceeded

prior to the time of the filing of the motion for summary judgment.

In *Jones v. General Motors Corp.*, 939 F.2d 380 (6th Cir. 1991), the Sixth Circuit held that it is "well settled that a plaintiff may not create a factual issue for the purpose of defeating a motion for summary judgment by filing an affidavit contradicting a statement the plaintiff made in a prior deposition." (939 F.2d at 385.) Petitioner here does not dispute this principle of law nor does he suggest that any court would be expected to accept a statement from a witness in an affidavit which is directly contrary to prior testimony given by that same witness under oath during a deposition. The obvious chaos and mischief which would be invited by permitting such a change in testimony is readily apparently.

However, no such "contradiction" took place between the Stamm's deposition testimony and his affidavit. The affidavit simply addressed specific points which had *not* been covered in the deposition to date. It is respectfully submitted that the Stamm affidavit was competent evidence sufficient to bar the entry of summary judgment.

Having decided that the deposition and the affidavit were contradictory, the Sixth Circuit concluded that it should pay no attention to Stamm's affidavit as it believed same was submitted solely for the purpose of changing sworn deposition testimony. Erroneously believing that the Stamm affidavit could be disregarded as a matter of law, the Sixth Circuit failed to consider the remaining evidentiary matters presented by defendants by noting that in the "new era" of summary judgment, as set out in *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989), the entry of summary judgment would be appropriate where the evidence is so "one-sided that one party must prevail as a matter of law."

Petitioner herein respectfully urges that the evidence presented was anything but "one-sided". The best evidence that a legitimate dispute existed is the fact that NHIC itself chose to treat this accident as within its coverage for a period of years before suddenly discovering a policy defense. That discovery took place *only after* an underlying lawsuit was filed in the Circuit Court of Cook County, Illinois and *after* NHIC was called upon to indemnify Luurtsema. Since the "central issue" in dispute was the intent of the parties, the Stamm affidavit should have been considered as "affirmative evidence" barring summary judgment.

The misapprehension of the Stamm affidavit was critical. Citing *Street v. J.C. Bradford & Co.*, the Sixth Circuit held that the evidence herein was so one-sided and that summary judgment was appropriate under the "new era" of summary judgment.

In *Street*, the Sixth Circuit noted that the first of the then "recent Supreme Court decisions which changed summary judgment law" was *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). In *Anderson*, this Court concluded that the "mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." (886 F.2d at 1477, quoting *Anderson.*) However, this Court, in *Liberty Lobby*, "cautioned that trials on affidavits were not justified and that summary judgments *should be granted with circumspection . . .*" (886 F.2d at 1477, quoting *Liberty Lobby.*) The Sixth Circuit concluded, based upon its analysis of *Liberty Lobby*, that Ezzell "must present affirmative evidence in order to defeat a properly supported motion for summary judgment."

The Sixth Circuit's analysis in *Street* turn upon the decision of this Court in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The *Street* court succinctly noted the thrust of *Celotex* as follows:

> "The [*Celotex*] court rejected the argument, accepted by the Court of Appeals, that the movant's initial showing of lack of genuine issue of material fact was insufficient because it was not supported by affidavits or other factual materials described in Fed.R.Civ. P. 56.
>
> "In other words, the movant could challenge the opposing party to 'put up or shut up' on a critical issue. After being afforded sufficient time for discovery, as required by Fed.R.Civ. P. 56(f), if the respondent did not 'put up,' summary judgment was proper." (886 F.2d at 1478.)

Also relied upon by the Sixth Circuit in *Street* was this Court's decision in *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Stating that the *Matsushita* opinion was "in harmony with *Liberty Lobby* and *Celotex*" as indicating a more "favorable regard for summary judgment", the Sixth Circuit summarized *Matsushita* as permitting summary judgment where the record, "taken as a whole could not lead a rational trier of fact to find for the non-moving party", thereby showing that there was "no 'genuine issue for trial.' " (886 F.2d at 1478.)

The Stamm affidavit, which addressed the central issue in this case in a manner which was *not* contradictory to that portion of his then completed deposition did indeed put forth evidence on the central issue—the intent of the parties. The Stamm affidavit showed that it was clearly the intention of Luurtsema to not only obtain the subject insurance coverage but, also that Luurtsema relied

upon the existence of said coverage to its detriment by not obtaining alternative coverage. The District Court wrongly questioned the "credibility" of Mr. Stamm despite the fact he did not appear before that court.

It is respectfully urged that the courts below improperly resolved issues of credibility without regard to whether a complete record was presented. Further, the Sixth Circuit misapprehended the true nature of the Stamm affidavit and the other unrebutted evidence which supported Luurtsema's position that the intent of the parties was to obtain coverage for the tractor-trailer involved in this accident through NHIC as well as the fact that Luurtsema relied upon this coverage to their detriment. Having mistakenly believed the Stamm affidavit to be incompetent, as a matter of law, as contradicting other sworn deposition testimony, the courts below worked a substantial injustice by denying defendants, including petitioner, their right to a trial on the merits of this cause.

It is also respectfully submitted that the Sixth Circuit's opinion reflects an overbroad view of the "new era" of summary judgment. As this Court cautioned in *Liberty Lobby*, and as the Sixth Circuit acknowledged in *Street v. J.C. Bradford & Co.*, even in this "new era" of such judgments, summary judgments "should be granted with circumspection". While a party opposing summary judgment may no longer simply snipe at the credibility of the moving parties' affidavits or attack the sufficiency of that evidence without doing more, it is respectfully urged that affirmative evidence was properly presented which raised far more than a "genuine issue of material fact" with regard to the intent of the parties. That evidence could have and should have been deemed sufficient for both the District Court and the Sixth Circuit to deny summary judgment to NHIC.

Petitioner believes that permitting summary judgment under the instant circumstances encourages an abuse of the summary judgment process rather than having the salutary effect intended by this Court in *Liberty Lobby*, *Celotex*, and *Matsushita*.

CONCLUSION

A petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ROBERT A. CLIFFORD
Counsel of Record
KEITH A. HEBEISEN
Two North LaSalle Street
Suite 700
Chicago, Illinois 60602
(312) 899-9090

DAVID A. NOVOSELSKY
KEVIN S. BESETZNY
120 North LaSalle Street
Suite 1400
Chicago, Illinois 60602
(312) 346-8930

Attorneys for Petitioner

APPENDIX

INDEX TO APPENDIX

	App. Page
Opinion of the United States Court of Appeals for the Sixth Circuit, filed September 7, 1993	1
Order of the United States Court of Appeals for the Sixth Circuit Denying Rehearing, filed October 21, 1993	10
Opinion of the United States District Court for the Western District of Michigan, Southern Division, dated March 24, 1992	12
Judgment of the United States District Court for the Western District of Michigan, Southern Division, dated March 24, 1992	29

App. 1

[Filed September 7, 1993]

[NOT RECOMMENDED FOR PUBLICATION]

Nos. 92-1484/1613/1614

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NEW HAMPSHIRE INSURANCE COMPANY,

Plaintiff-Appellee,

v.

A. LUURTSEMA TRUCK LINES, INC., MICHIGAN MUTUAL INSURANCE COMPANY, JEFFREY JAY EZZELL, and GEORGE WILDER,

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Michigan.

Before: RYAN and BOGGS, Circuit Judges; and ECHOLS, District Judge.*

RYAN, Circuit Judge. Defendants appeal from the district court's entry of summary judgment for the plaintiff insurance company in this consolidated diversity action seeking a declaratory judgment and the reformation of

---

* The Honorable Robert L. Echols, United States District Judge for the Middle District of Tennessee, sitting by designation.

a commercial vehicle insurance contract. Defendants contend that the district court erred in entering summary judgment for the plaintiff and by reforming the parties' insurance policy.

For the reasons stated, we shall affirm.

I.

In its complaint giving rise to this appeal, New Hampshire Insurance Company (NHIC) sought a judgment that A. Luurtsema Truck Lines, Inc. was not entitled to NHIC insurance coverage for a tractor-trailer accident involving Jeffrey Jay Ezzell. Ezzell was severely injured on September 29, 1987, when the Luurtsema tractor-trailer in which he was riding fell from a 30 foot overpass on the Stevenson Expressway near Chicago. Defendant Michigan Mutual Insurance Company (MMIC), another Luurtsema liability insurer, filed a counterclaim against NHIC, seeking indemnification for a pro rata share of the defense costs it incurred in defending a tort claim brought by Ezzell against Luurtsema in Illinois state court. MMIC also sought reimbursement for the difference between $750,000 paid by MMIC in settlement of the Ezzell lawsuit, and $645,000, which MMIC claimed would have been its liability limit had NHIC joined in the Illinois litigation. The parties' dispute turns on the language of a commercial vehicle insurance policy issued by NHIC to Luurtsema.

Through 1984 and 1985, Luurtsema's trucking operation was insured through MMIC with primary limits of liability of $1 million and umbrella limits of $2 million. In August 1985, MMIC informed Luurtsema that it would no longer cover Luurtsema's long-haul liability exposure. Luurtsema was forced to look elsewhere for its trucking liability cov-

erage. John Stamm, a Luurtsema employee responsible for insurance matters, turned to the Michigan Automobile Placement Facility or "assigned risk pool" because it offered the best rates. Eventually, Stamm ended up finding an alternative insurance offering sold by MMIC through the risk pool. He obtained an MMIC policy covering the company's tractor-trailers to a liability limit of $750,000.

Luurtsema's tractor-trailers and its passenger automobiles had formerly been insured under the same MMIC policy. In 1985, however, Stamm apparently believed that the assigned risk pool policy would only provide coverage for tractor-trailers. He therefore sought separate coverage for Luurtsema's private passenger automobiles. He approached Douglas McColl of the F.W. Grotenhuis Underwriters, Inc. agency, an independent insurance agent, for premium quotations for the private passenger vehicles. Ultimately, Stamm obtained for Luurtsema a business auto policy from NHIC with a $1 million liability coverage limit. The parties' intent in entering into this contract, and the policy's terms, are at the center of this dispute. Luurtsema, MMIC, and Ezzell contend that the policy Stamm sought from NHIC, through the Grotenhuis agency, was to provide additional coverage for Luurtsema's tractor-trailers. NHIC, in contrast, contends that the parties' intent was to establish a policy covering only Luurtsema's passenger automobiles and light trucks.

When the policy from NHIC eventually issued, there appeared, in the coverage space, the number "2," which indicated coverage for all owned "autos." The policy defined an auto as "a land motor vehicle, trailer or semitrailer designed for travel on public roads." This policy, with essentially the same terms, including the number "2," was renewed by Luurtsema for two subsequent years. During this same time, coverage on Luurtsema's tractor-trailers was maintained with MMIC.

The scope of the policy's coverage was first questioned following the tractor-trailer accident in Chicago in which Ezzell was injured. The driver of the truck was defendant George Wilder; Ezzell was a passenger. On October 30, 1987, Ezzell filed suit against Luurtsema in Cook County Circuit Court in Chicago. Stamm notified MMIC of the accident on November 3, 1987, by letter, and requested that MMIC "handle the matter." NHIC was not notified of the Chicago lawsuit until June 16, 1988. The notice given to NHIC indicated that MMIC was defending Luurtsema. Consequently, NHIC did not make an appearance in the Chicago court action. Instead, it filed this action on August 31, 1990 seeking a declaratory judgment.

The Chicago litigation never proceeded to trial. On December 13, 1990, Luurtsema, MMIC, Ezzell, and Wilder entered into a court-approved consent judgment. The consent judgment provided that Ezzell would recover $1.75 million. However, in agreeing to the consent judgment, Ezzell also signed a "covenant not to execute" against Luurtsema, MMIC, and Wilder. The consent judgment provided that Luurtsema's total liability coverage was $1.75 million, $1 million under NHIC's policy and $750,000 under MMIC's policy. The consent judgment further stated that NHIC's policy provided excess coverage to the MMIC policy. MMIC tendered $750,000 to Ezzell and the covenant not to execute permitted Ezzell to execute against NHIC for the $1 million remaining on the judgment.

NHIC was not a party to the Chicago litigation. Its name did not appear as a party on the pleadings in that action and the defendants do not argue that NHIC was being sued in Chicago. Indeed, the state court judge in Chicago was careful to make a record that NHIC had not appeared in the Chicago lawsuit, and that the terms of the consent judgment were based on the facts as represented by Luurtsema, MMIC, and Ezzell.

In this action, NHIC moved the district court for entry of summary judgment, contending that it was obvious that the policy issued by it to Luurtsema was not intended to cover Luurtsema's tractor-trailers; that the number "2" on the policy's liability designation had been included by mistake; and that the number "7" should have appeared instead. The district court agreed, reformed the policy to include the liability designation "7" rather than "2" and granted summary judgment for NHIC. Defendants timely appealed.

II.

A.

The defendants contend that this case turns largely on the parties' intent, which should only be determined after a full trial. They argue that the district court usurped the role of fact finder by improperly drawing conclusions about the parties' intent based only on depositions, affidavits, and other documents. Defendants further contend that questions of material fact remain, principally because of deposition testimony given by Stamm. Finally, they maintain that the district court's reformation of the insurance policy was error under Michigan law. Defendants urge this court to reverse.

NHIC argues that there was never any agreement between Luurtsema and NHIC to insure long-haul tractor-trailers, and that the district court's finding that a mistake was made when the policy was issued was correct. NHIC contends that defendants produced insufficient evidence to survive a motion for summary judgment. Moreover, NHIC contends, the district court's reformation of the insurance contract was a correct application of Michigan law. NHIC urges this court to affirm.

B.

We review a district court's entry of summary judgment *de novo*. *National Bank of Detroit v. Shelden*, 730 F.2d 421, 423 (6th Cir. 1984). Summary judgment is proper where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

It is well established under Michigan law that reformation is available as an equitable remedy in contract law. *See, e.g., Bleam v. Sterling Ins. Co.*, 360 Mich. 208, 210 (1960). Reformation is available when an instrument

> "fails to express the intentions of the parties thereto as the result of accident, inadvertence, mistake, fraud, or inequitable conduct . . . ."

Najor v. Wayne Nat'l Life Ins. Co., 23 Mich. App. 260, 272 (1970) (citation omitted). If the ground asserted is mistake, " 'the alleged mistake must be one of substance and of fact, and not of law.' " *Emery v. Clark*, 303 Mich. 461, 471 (1942) (citation omitted). Moreover, the party seeking reformation bears the burden of showing the mistake by " 'clear and entirely satisfactory evidence, and that . . . the mistake must be mutual and common to both parties to the instrument.' " *Id.* (citation omitted). An examination of the evidence introduced in the proceedings below clearly demonstrates that NHIC satisfied these requirements.

The error made was definitely of substance. The ramifications of the erroneous inclusion of the number "2," instead of the number "7," in liability designation could potentially mean a difference of $1 million for the parties. All parties would seem to concede this point. It is likewise clear that the mistake alleged by NHIC is not a mistake of law, or an error in predicting future risks

which parties to a contract must always bear. The parties were not confused about an external fact or event. The alleged mistake arose in the written expression of the parties' agreement.

First, the face of the policy itself indicates that the seemingly broad liability designation indicated by the number "2" was not contemplated, because this designation is facially inconsistent with other portions of the document. For instance, the policy is a "business auto policy." NHIC produced deposition evidence that when trucks are insured it uses, as does MMIC, a "truck policy." Next, the schedule of autos covered by the policy includes only passenger vehicles; no mention of tractor-trailers is made. Moreover, the drivers listed on the policy are all office personnel from Luurtsema's headquarters. None of these persons is a long-haul truck driver.

Second, the binder attached to the policy states that only "[p]rivate passenger vehicles and three service pick-up trucks" are to be covered. Elsewhere on this same binder it states that the insurance is on "private passenger vehicle[s]."

Third, the premiums paid under the NHIC policy obviously did not include premiums for Luurtsema's tractor-trailers. NHIC, in its motion for summary judgment, produced the deposition of John Burke, its "underwriting specialist." Therein, Burke stated that

> [t]he premium reflects coverage only for the scheduled autos, and not the long-haul tractor-trailers owned by the insured. . . . The premium for coverage of the long-haul tractor-trailers of the insured would be substantially higher . . . .

The defendants did not rebut this assertion.

Finally, everyone involved in the issuance of the original NHIC policy to Luurtsema stated in depositions or in documentary evidence, even against their own interests, that the parties intended only to cover Luurtsema's passenger vehicles and light trucks. Stamm wrote a note to Luurtsema's MMIC agent on April 7, 1987, after the NHIC policy issued. Therein he stated "*Cars* are currently with New Hampshire." (Emphasis added.) McColl also wrote Stamm a letter on May 18, 1989, wherein he stated

> the policy should have shown Symbol 7 all along. It was your & my original understanding that we only wanted to cover private passenter cars and pick-up trucks. We never intended to cover tractors or trailers. Other coverage was always in force to cover the big rigs.

Stamm made no reply to this letter, and the defendants produced no evidence, in opposition to the motion for summary judgment, rebutting it. It is also worth noting that during the approximately three years the policy was in effect, Luurtsema frequently notified NHIC about changes in passenger vehicles and passenger-vehicle drivers under the policy. No communication from Luurtsema was ever made regarding changes with tractor-trailers, though presumably drivers and rigs changed during that time. The only explanation for this is that Luurtsema did not believe its tractor-trailers were covered by NHIC.

The defendants' reliance on the Stamm affidavit for the creation of a material issue is misplaced. In this "new era" of summary judgment, a mere discrepancy between opponents is insufficient to take an issue to the trier of fact. Rather, where the " 'evidence . . . is so one-sided that one party must prevail as a matter of law,' " *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989)

(citation omitted), entry of summary judgment is appropriate. Stamm's affidavit, even though it contradicted earlier evidence obtained from Stamm during discovery, was insufficient to raise a "genuine issue as to any material fact," Fed. R. Civ. P. 56(c), about the parties' intent. *See Jones v. General Motors Corp.*, 939 F.2d 380, 384-85 (6th Cir. 1991).

In conclusion, there is simply no evidence sufficient for trial that Luurtsema and NHIC intended to insure Luurtsema's tractor-trailers on the policy issued by NHIC. The district court's entry of summary judgment was appropriate, and its reformation of the policy was not error.

III.

For the foregoing reasons, we AFFIRM the judgment of the district court.

[Filed October 21, 1993]

Nos. 92-1484/1614

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NEW HAMPSHIRE INSURANCE COMPANY,
A FOREIGN CORPORATION,

Plaintiff-Appellee,

v.

A. LUURTSEMA TRUCK LINES, INC., A MICHIGAN CORPORATION,

Defendant,

MICHIGAN MUTUAL INSURANCE COMPANY,
A MICHIGAN CORPORATION,

Defendant-Appellant,

JEFFREY JAY EZZELL; GEORGE WILDER,

Defendants.

ORDER

BEFORE: RYAN and BOGGS, Circuit Judges; and ECHOLS,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active

---

* Hon. Robert L. Echols, United States District Judge for the Middle District of Tennessee, sitting by designation.

judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

App. 12

[Dated March 24, 1992]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

File No. 1:90-CV-747
Hon. Benjamin F. Gibson

NEW HAMPSHIRE INSURANCE COMPANY, a foreign corporation,

Plaintiff,

v.

A. LUURTSEMA TRUCK LINES, INC., a Michigan corporation, and MICHIGAN MUTUAL INSURANCE COMPANY, a Michigan corporation, JEFFREY JAY EZZELL, and GEORGE WILDER,

Defendants.

and

MICHIGAN MUTUAL INSURANCE COMPANY, a Michigan corporation,

Counterplaintiff,

v.

NEW HAMPSHIRE INSURANCE COMPANY, a foreign corporation,

Counterdefendant.

OPINION

This is a declaratory judgment action for the reformation of an insurance contract entered into between plain-

tiff/counterdefendant New Hampshire Insurance Company ("plaintiff") and defendant A. Luurtsema Truck Lines, Inc. ("ALTL"). In its second amended complaint for declaratory judgment, plaintiff seeks a judgment that ALTL is not entitled to insurance coverage for a semi-trailer accident involving defendant Jeffrey Jay Ezzell ("Ezzell"). Defendant/counterplaintiff Michigan Mutual Insurance Company ("MMIC") has filed a second amended counterclaim against plaintiff seeking indemnification for a pro rata share of the defense costs incurred by MMIC in defending a tort claim brought by Ezzell against ALTL in Illinois state court. MMIC also seeks reimbursement for the difference between $750,000.00 paid by MMIC in settlement of the Ezzell lawsuit and $645,000.00 which MMIC claims would have been its liability limit had plaintiff joined in the Illinois litigation.

Now pending before the Court are plaintiff's motion for summary judgment, defendants' joint cross-motion for summary judgment, and MMIC's motion for summary judgment on its counterclaim. The parties have thoroughly briefed the factual and legal issues involved. Upon review of the file and arguments presented, for the reasons stated below, plaintiff's motion for summary judgment is granted and MMIC's counterclaim is dismissed.

I.

Although the various parties urge that the Court interpret the facts at issue to meet their respective theories of the case, the facts themselves are straightforward and are not in dispute. ALTL is a trucking company. Throughout the relevant time period, John Stamm ("Stamm") was the ALTL employee responsible for "all liability insurance matters." Plaintiff's Exhibit 8 in Support of Summary Judgment ("Plaintiff's Exhibit 8") at 2. Through 1984 and

1985, ALTL's trucking operation was insured through MMIC with primary limits of liability of $1 million and umbrella limits of $2 million. However, in August of 1985, MMIC informed ALTL that it would no longer cover ALTL's long-haul liability exposure. Plaintiff's Exhibit 13. Apparently, this decision was due to an overall shrinkage of the trucking insurance industry in Michigan in 1985. McColl Deposition at 20. ALTL was forced to look elsewhere for its trucking liability coverage. In attempting to secure insurance for ALTL, Stamm turned to the Michigan Automobile Placement Facility or "assigned risk pool" because it offered the best available premium rates. Stamm Deposition at 36-39. MMIC was under contract with the State Bureau of Insurance to write commercial coverage through the assigned risk pool. Accordingly, ALTL's long-haul exposure was insured through MMIC. Liability coverage for the tractor-trailers under the MMIC policy was limited to $750,000.00.

Formerly ALTL's tractor-trailers and its passenger automobiles and pick-up trucks had been insured under the same MMIC policy. In 1985 though, Stamm believed that the assigned risk pool would only provide coverage for commercial vehicles, *i.e.*, tractor-trailers. Stamm Deposition at 52. He therefore obtained separate coverage for ALTL's private passenger automobiles. Stamm approached Dougald McColl ("McColl") of the F.W. Grotenhuis Underwriters, Inc. Agency ("Grotenhuis"), an independent insurance agent, for premium quotations for the private passenger automobile coverage. Although Stamm's affidavit indicates that he may have approached McColl for excess trucker insurance, his prior deposition establishes an intent to the contrary. In his deposition, Stamm testified that the only quote he remembered receiving for the trucks was from MMIC, through the assigned risk pool.

Stamm Deposition at 39. He likewise asserted that the insurance policy ALTL ultimately received from plaintiff through Grotenhuis and McColl was to cover ALTL's non-commercial vehicles:

Q: Why did they get the other policy from New Hampshire?
A: Because we were told the assigned risk pool would cover only commercial vehicles.
Q: Okay. So your purpose in getting the New Hampshire policy was to cover noncommercial vehicles?
A: Yes.
Q: That would be vehicles other than trucks?
A: Yes, and any coverages that came along with it.

Stamm Deposition at 53. In his affidavit, Stamm waivers on ALTL's reason for seeking insurance through plaintiff. He states that he did not request that long-haul coverage be excluded under plaintiff's policy. Stamm Affidavit at 2. The implication to be drawn, although not explicitly stated, is that Stamm intended to obtain excess coverage for the trucks through a policy with plaintiff. Given the clear statement contained in Stamm's deposition, however, the Court will not draw that inference. A witness cannot raise a material issue of fact for the purpose of summary judgment by making an affidavit that contradicts an earlier taken deposition. *Gagne v. Northwestern National Ins. Co.*, 881 F.2d 309, 314 (6th Cir. 1989); *Reid v. Sears, Roebuck and Co.*, 790 F.2d 453, 460 (6th Cir. 1986).

Ultimately Stamm obtained a business auto policy from plaintiff with a $1 million coverage limit. A copy of the application for this insurance taken by McColl indicates that the coverage of the policy was intended to be for automobiles and service pick-up trucks owned by ALTL.

Plaintiff's Exhibit 3.[1] The covered automobiles are indicated by a coverage symbol 7. It is uncontroverted that the coverage symbol 7 indicates that coverage through the policy is available only for automobiles listed on the attached schedule. Attached to the application is a schedule of covered automobiles which lists nine cars and pick-ups. These vehicles are described as being used for either pleasure, to drive to and from work, for business use, or for service use. *Id.* None of the covered vehicles are tractor-trailers. None of the covered vehicles are used for long-haul transportation. Similarly, written across the top of the application, with the symbol 7 circled, are the words "Must be issued on this basis—long haul exp." *Id.* This notation was made by Sharon Vanloon, a commercial underwriter for plaintiff. Vanloon Deposition at 16-17. She testified that she made the notation to make sure the policy only provided coverage under symbol 7 because plaintiff would not provide long-haul coverage for ALTL. *Id.*

When plaintiff's policy was issued, however, it indicated a coverage symbol 2 for liability. Symbol 2 indicates that

---

[1] Defendants assert that the copy of the application submitted by plaintiff cannot be properly authenticated and, therefore, should not be considered by the Court. However, both Sharon Vanloon and McColl have testified in deposition that the copy produced by plaintiff is an authentic copy of the original application. Vanloon Deposition at 16; McColl Deposition at 29-30. This testimony is sufficient to authenticate the document as a copy. Fed. R. Evid. 901(b)(1). Defendants do not contest the accuracy of the original application. They concede that it was completed by McColl and that Stamm never reviewed it. Stamm Affidavit at 1. Likewise, the application's accuracy is corroborated by Stamm's deposition testimony that he sought "non-commercial" vehicle coverage from McColl. There is no genuine issue raised as to the authenticity of the original, which is apparently missing; therefore the copy is admissible. Fed. R. Evid. 1003.

coverage is for "all owned autos."[2] Autos is defined by the policy as including trailers or semi-trailers. Plaintiff's Exhibit 2. There can be no doubt that issuance of this coverage was a mistake on the part of plaintiff. Defendants admit as much in their brief and in documents produced through discovery.[3] Ken Fonger, an MMIC claims representative, made the following assessment of the policy at issue herein:

> Simple logic will tell us that no insurance company wants to write concurrent coverage but that is what we have and New Hampshire says it is a mistake, *we believe them.*. We have seen their policy and it certainly appears that they have no intention to insure semi trucks.

Plaintiff's Reply Brief, Exhibit 2 (emphasis added). Defendants admit that Fonger's statement is relevant as to plaintiff's intent. Defendants' Reply to Plaintiff's Response at 13. Likewise, in a letter to plaintiff's attorney, Robert Scott, another MMIC claims representative, made the statement: "It is apparent there was a mistake made

---

[2] In his deposition, Stamm makes the circular argument that coverage symbol 2 was the agreed upon symbol because that is what was on the policy issued by plaintiff. Stamm Deposition at 106-08. This testimony ignores Stamm's recollection that he approached McColl for coverage of the "non-commercial vehicles." There is no evidence that Stamm's intent changed between the time he contacted McColl and the time the policy was actually issued.

[3] Defendants assert: "If the placing of a number 2 instead of a number 7 was a mistake, it was the mistake of New Hampshire Insurance Company. If this was a mistake, it was due to the negligence of New Hampshire." Defendants' Brief in Support of Summary Judgment at 4.

when transferring information from the application to the declaration's page." *Id.*[4]

There is also substantial corroborating evidence to establish that plaintiff did not intend to extend liability coverage to all of ALTL's owned vehicles. For example, Stamm's deposition establishes that he was interested in purchasing liability, collision, and comprehensive coverage for ALTL's passenger vehicles. After the policy was issued, on April 4, 1987, Stamm also wrote a note to ALTL's MMIC agent which stated: "Cars are currently with New Hampshire." Plaintiff's Exhibit 22.

Moreover, a comparison of the MMIC policy with plaintiff's policy compels the conclusion that plaintiff's policy is of a different type than that issued by MMIC. The policy issued by plaintiff is titled "Business Auto Policy." It provides for liability coverage up to $1 million. Attached to the policy is a schedule of covered vehicles and the premium for the 1987 to 1988 year was $4,027.00. Plaintiff's Exhibit 2. The MMIC policy, to the contrary, is titled "Truckers Policy." It provides for maximum liability coverage of $750,000.00. There is no schedule of covered vehicles attached to the policy and the premium

[4] In support of its motion for summary judgment on its counterclaim, MMIC has introduced the affidavit of Clinton Miller, J.D. Likewise, plaintiff has introduced the deposition of Phillip Margolis. Both men testify that they are experts in insurance underwriting and claims adjusting and investigation. Miller's review of this lawsuit leads him to the conclusion that plaintiff had a contractual duty arising under the policy. Miller Affidavit at 3-4. Not surprisingly, Margolis' testimony is to the contrary. Margolis Deposition at 63-66. The testimony of so-called experts on the legal conclusion that the contract at issue is binding as written is both irrelevant and inappropriate. The Court does not need expert guidance to resolve the ultimate issue in this action and it pays no credence to Miller's or Margolis' testimony.

for the 1987 to 1988 year was $27,056.00. Plaintiff's Exhibit 1.

The testimony of Dougald McColl, likewise, indicates that a mistake was made in drafting the insurance policy. He states:

> Our policy was to provide coverage for the light trucks, pick-up trucks, and passenger cars owned by Luurtsema, and used by their employees and their family members. There was a distinct difference between the intent of which policy covered which type of vehicle. . . . *It was my intent,* when I put this together, with the understanding of the insured and with conversations with the company underwriter, that we were only going to be providing protection or coverage for a schedule of specific private passenger vehicles and light trucks.

McColl Deposition at 25-26 (emphasis added). In addition, he has testified that the premium payments under the policy do not reflect liability coverage for long-haul tractor-trailers. He stated: "We specifically had some ballparks of $5,000 to $6,000 per tractor for the liability coverage." *Id.* at 35. McColl's testimony is entirely consistent and it corroborates the substantial evidence that plaintiff erred in issuing the policy with a liability coverage symbol 2. It is also highly relevant to a determination of plaintiff's intent in this matter. McColl wrote the application as plaintiff's agent. He indicated what he intended the policy to cover. Combined with all of the other evidence, there can be no question that plaintiff's intent was contrary to that expressed in the policy as issued.

All of the foregoing information was made relevant to this case by a traffic accident involving an ALTL long-haul tractor-trailer. On September 29, 1987, defendant Ezzell was a passenger in an ALTL truck driven by defendant George Wilder ("Wilder"), an ALTL employee.

As the truck was proceeding southbound on the Stevenson Expressway in Chicago (I-55), Wilder lost control of the steering wheel and the tractor-trailer left an overpass, falling thirty-one feet to the ground below. Ezzell suffered severe injuries. He retained a lawyer and on October 30, 1987, filed suit against ALTL in Cook County Circuit Court in Chicago.

On November 30, 1987, Ezzell's attorneys requested that ALTL immediately notify its insurer of a potential claim. Ross Luurtsema, ALTL's president, has testified that it was only after the accident that he became aware that plaintiff's policy may have provided coverage. Ross Luurtsema Deposition at 24-25. Stamm had notified MMIC on November 3, 1987, and requested that they "handle the matter." Plaintiff's Exhibit 6. Plaintiff was not notified of the lawsuit until June 16, 1988. The notice indicated that MMIC was providing a defense for ALTL. Plaintiff's Exhibit 18. Plaintiff never appeared in the state court action. Instead, after making various settlement offers which MMIC describes as "lowball", plaintiff filed this declaratory judgment action on August 30, 1990. MMIC's Brief in Support of Motion for Summary Judgment on its Counter-Claim at 3.

The Illinois litigation never proceeded to trial. On December 13, 1990, MMIC, ALTL, Wilder, and Ezzell entered into a consent judgment. Plaintiff's Exhibit 8. The judgment was approved by the presiding judge, the Honorable Irving R. Norman. The consent judgment provided that Ezzell would recover $1.75 million. However, in agreeing to the consent judgment, Ezzell also signed a "covenant not to execute" against Wilder, ALTL, and MMIC. The consent judgment provides that ALTL's total liability coverage was $1.75 million, one million dollars under plaintiff's policy and $750,000 under MMIC's policy. The con-

sent judgment further states that plaintiff's policy provides excess coverage to the MMIC policy. *Id.* at 3-4. MMIC tendered $750,000.00 to Ezzell and the covenant not to execute permits Ezzell to execute against plaintiff for the $1 million remaining on his judgment. *Id.*, Covenant at 4.

It is evident that plaintiff was not a party to the Illinois litigation. Its name does not appear on the caption in that action and defendants do not argue that plaintiff was being sued in Illinois. Likewise, Judge Norman was careful to make a record that plaintiff had not appeared by attorney in the Illinois lawsuit and that the terms of the consent judgment were based on the facts as represented by Ezzell, ALTL, and MMIC. Transcript of Consent Judgment Hearing at 8, 13-14.

II.

Summary judgment is appropriate when "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Atlas Concrete Pipe, Inc. v. Roger J. Au & Son, Inc.*, 668 F.2d 905, 908 (6th Cir. 1982). There is no material issue of fact for trial unless, by viewing the evidence in favor of the nonmoving party, a reasonable jury could return a verdict for that party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Boddy v. Dean*, 821 F.2d 346, 349 (6th Cir. 1987). "If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249 (citations omitted).

The party moving for summary judgment bears the initial responsibility of informing the court of the basis for its motion and identifying those portions of the record

which demonstrate the absence of a material issue of fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Potters Medical Center v. City Hospital Association*, 800 F.2d 568, 572 (6th Cir. 1986). Once the moving party has met its burden, the nonmoving party must go beyond the pleadings and come forward with specific facts to show that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 322-24. If after adequate discovery the party hearing the burden of proof fails to make a showing sufficient to establish an essential element of his claim, summary judgment is appropriate. *Id.*

III.

Again, the facts establish that plaintiff made a mistake when it issued ALTL's business auto policy under a liability symbol 2. The issue before the Court is whether that mistake relieves plaintiff of any obligation to provide liability insurance for a vehicle that it did not intend to insure. Ordinarily, the rule in Michigan is that:

> to justify the reformation of a written contract upon the ground of mistake the alleged mistake must be one of substance and of fact, and not of law; that such mistake must be proved by clear and entirely satisfactory evidence, and that a mere preponderance of the evidence is not sufficient and that the mistake must be mutual and common to both parties to the instrument.

Emery v. Clark, 303 Mich. 461, 471, 6 N.W.2d 746 (1942), *quoting Burns v. Caskey*, 100 Mich. 94, 100, 58 N.E. 642 (1894). Plaintiff has proven the first prong of this requirement by clear and satisfactory evidence. The error made in the writing was unquestionably of substance. It was not an error of fact in the sense that the parties were confused about some external fact or event which had a

bearing on contract performance. The mistake came in plaintiff's expression of the parties' actual agreement. A relevant term and condition of that agreement was misstated. Nevertheless, the error was a factual rather than a legal misstatement. Defendants submit, however, that even assuming plaintiff made a mistake, there is no material issue of fact for trial that plaintiff's mistake was not mutual. Therefore they believe they are entitled to enforcement of the policy as written. This argument fails for two reasons.

First, the evidence before the Court establishes that the parties' mistake was mutual. Stamm's deposition is clear. His intent was to obtain insurance coverage for the private autos and pick-up trucks. Stamm Deposition at 53-54, 65. Through Stamm, ALTL knew that the policy as written did not express the parties' mutual intent.[5] Ross Luurtsema's testimony supports that finding. Likewise, the differences between the insurance application and the written policy as well as the differences between the MMIC policy and plaintiff's policy necessarily put ALTL on notice that plaintiff did not intend to insure ALTL's semi-trucks. The respective titles of the policies, the schedule of covered autos attached to plaintiff's policy, the difference in coverage amounts, and the huge difference in premium payments make it clear, drawing all reasonable inferences in favor of defendants, that ALTL knew

[5] Evidence of an agreement to the contrary of that stated in the executed policy is not precluded by the parol evidence rule. Where a mistake in expression allegedly results in an ambiguity, the parties' actual agreement is of primary importance. It may be proven by referral to evidence outside the four corners of the written instrument. *Goodwin, Inc. v. Coe*, 392 Mich. 195, 204, 220 N.W.2d 664 (1974); *NAG Enterprises, Inc. v. All State Industries, Inc.*, 407 Mich. 407, 410-11, 285 N.W.2d 770 (1979).

from the outset that plaintiff was not insuring its long-haul operations either on a primary or excess basis.

This conclusion is bolstered by ALTL's past performance under this policy. ALTL provided plaintiff with schedules of new automobiles to be added to the coverage of the policy. Plaintiff's Exhibit 2. If ALTL believed that it had contracted for coverage for any owned vehicle, these schedules were unnecessary and redundant. The schedules themselves also do not identify any tractor-trailers as covered vehicles. *Id.* Likewise, ALTL's decision not to inform plaintiff of the claim until some six months after the Illinois litigation commenced evidences its understanding that plaintiff's policy did not provide coverage. In his affidavit, Stamm explains this delay to be caused by his apprehension that plaintiff would raise its rates if a claim was made under the policy. Stamm Affidavit at 3-4. This explanation is not convincing. ALTL was facing significant exposure in the Ezzell case. The idea that it would not want to take advantage of any insurance which arguably would cover Ezzell's claim flies in the face of reality, much less sound business practice. There is no question in the Court's mind that ALTL did not make a claim because ALTL did not believe that it was entitled to make a claim. The evidence is clear and satisfactory that the mistake in expressing the parties' intent was mutual.

Second, even assuming for the sake of argument that ALTL believed that it had coverage under plaintiff's policy, the unilateral mistake of plaintiff entitles it to reformation of the policy. The difference between symbol 2 on the policy and the symbol 7 on the application, as well as the attached schedule of covered autos on plaintiff's policy, the title of the policy, and the premium charged creates a patent ambiguity on the face of the contract.

On the one hand, the contract seems to provide insurance for all autos. On the other hand, the application evidences a contrary intent and the attached schedule, the title, and the premium raise the inference that coverage did not extend to all autos. Where there is an ambiguity on the face of a written contract, the contract may be reformed notwithstanding that the mistake in the contract was unilateral:

> A written instrument may be reformed where it fails to express the intentions of the parties thereto as the result of accident, inadvertence, mistake, fraud, or inequitable conduct, or both fraud and mistake, fraud or inequitable conduct being on one side and mistake on the other. Conversely, in the absence of satisfactory proof of accident, fraud, or mistake, there is no basis for a court of equity to reform an instrument.

Najor v. Wayne Nat. Life Ins. Co., 23 Mich. App. 260, 272, 178 N.W.2d 504 (1970), *quoting* 45 Am. Jur. *Reformation of Instruments* § 45, p.609. Here, plaintiff's mistake came in inadvertently misstating its intent. The contract as written does not reflect a meeting of the minds as far as the policy's liability coverage goes. The Court's duty under these circumstances is to replace the ambiguous term with a reasonable one where injustice can be avoided only by reforming the contract.[6]

---

[6] An ambiguous insurance contract is generally to be construed in favor of the insured. *Van Zanten v. Nat'l Casualty Co.*, 333 Mich. 28, 36, 52 N.W.2d 581 (1952); *U.S. Fidelity & Guar. Co. v. Group Health Plan*, 131 Mich. App. 268, 274, 345 N.W.2d 683 (1983). However, here the extrinsic evidence establishes that the parties' intent was clear despite the ambiguity created by the mistake in expression. Given the parties' clear intent, to read the ambiguity in ALTL's favor would result in an inequity.

Defendants repeatedly assert that any error in drafting the policy was caused by plaintiff's negligence, and therefore plaintiff should be held responsible for its mistake. In the generic sense of the term, plaintiff may have been negligent in issuing this policy. However, legally, this is not a negligence action. The issue before the Court is whether plaintiff has a contractual, mutually agreed upon obligation to ALTL. Whether or not plaintiff was negligent is irrelevant. Accordingly, there is no basis for defendants' argument that ALTL is entitled to judgment because of plaintiff's "negligence." In equity and fairness the Court must reform the contract to express the parties' actual intent.

Defendants raise various estoppel, waiver, and laches claims in support of an argument that plaintiff is bound by the Illinois court's consent judgment. Estoppel arises where an individual wrongfully or negligently induces another to believe certain untrue facts exist and causes the other person to rely on those untrue facts to his detriment. *Hetchler v. American Life Ins. Co.*, 266 Mich. 608, 613, 254 N.W. 221 (1934); *Huhtala v. Travelers Ins. Co.*, 401 Mich. 118, 125, 257 N.W.2d 640 (1977). Here, even assuming that plaintiff was negligent, there has been no reliance by, or injury to, ALTL. The evidence before the Court establishes that ALTL knew plaintiff did not provide tractor-trailer coverage. In any event, Ezzell signed a covenant not to execute against ALTL's assets thereby fully mitigating any injury to ALTL.[7]

The doctrines of laches and waiver bar a claim for reformation not brought within a reasonable time of learning

[7] Ezzell, Wheeler, and MMIC cannot be said to have relied on plaintiff's policy. They were not parties to the contract and in any event were wholly unaware of the existence of the policy until after the accident.

of the allegedly true facts. *Speicher v. Thompson*, 141 Mich. 654, 665, 104 N.W. 1104 (1905). If plaintiff does not timely assert its rights under the contract, it may be barred from asserting them later if it would be inequitable to enforce those rights. *Taylor v. Groll*, 288 Mich. 590, 595, 286 N.W. 88 (1939). Again, ALTL can show no prejudice arising out of plaintiff's delay in bringing this declaratory judgment action. Defendants had notice of the present action before they entered into the Illinois consent judgment. No inequity arises in permitting plaintiff to contest the coverage of the policy.

Defendants also aver that plaintiff owed a duty to ALTL to defend the Ezzell lawsuit. By abrogating that duty, plaintiff allegedly waived any rights it might have had to object to the Illinois consent judgment. Again, this argument fails to recognize that plaintiff consistently contested coverage. This Court has found that in fact it had no duty to defend ALTL. There is no possibility of waiver under these circumstances.

Defendants finally assert that the Full Faith and Credit Clause of the United States Constitution and the doctrine of collateral estoppel compel this Court to enforce the Illinois consent judgment. The Full Faith and Credit Clause requires a court in one state to give binding effect to the judgment of a sister-state court. United States Constitution, Art. IV, § 1; *Milwaukee County v. M. E. White Co.*, 296 U.S. 268, 277 (1935). The doctrines of collateral estoppel and *res judicata* likewise stand to ensure that the judgment of one court is followed by a second court when the same issues and parties are before the second court. "Final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). In this case though, neither was plaintiff a party to the

Illinois litigation nor was the plaintiff's contract liability an issue before the state court. "In order for collateral estoppel to apply, the issue must be identical to that determined in the prior action." *Amalgamated Transit Union Local 1564 v. Southeastern Michigan Transp. Auth.*, 437 Mich. 441, 451, 473 N.W.2d 249 (1991), *citing NAACP v. Detroit Police Officers Ass'n*, 821 F.2d 328, 330 (6th Cir. 1987). The Full Faith and Credit Clause is not implicated here and by operation of collateral estoppel rules, the consent judgment has no binding effect on the Court's resolution of the liability issue now before it. The issues raised have not previously been adjudicated amongst the present parties.

IV.

MMIC's counterclaim is wholly premised on the proposition that plaintiff's policy provided concurrent primary coverage with MMIC's policy for tractor-trailer liability. Given the Court's finding that the policy does not provide tractor-trailer liability coverage, this claim is meritless.

V.

For the reasons stated above, plaintiff's motion for summary judgment is granted. The insurance policy at issue is reformed to include a liability symbol 7. Defendants' cross-motion for summary judgment is denied, and MMIC's motion for summary judgment on its counterclaim is denied.

/s/ Benjamin F. Gibson
BENJAMIN F. GIBSON
U.S. DISTRICT JUDGE

Dated: March 24, 1992

[Dated March 24, 1992]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

File No. 1:90-CV-747
Hon. Benjamin F. Gibson

NEW HAMPSHIRE INSURANCE COMPANY, a foreign corporation,

Plaintiff,

v.

A. LUURTSEMA TRUCK LINES, INC., a Michigan corporation, and MICHIGAN MUTUAL INSURANCE COMPANY, a Michigan corporation, JEFFREY JAY EZZELL, and GEORGE WILDER,

Defendants.

and

MICHIGAN MUTUAL INSURANCE COMPANY, a Michigan corporation,

Counterplaintiff,

v.

NEW HAMPSHIRE INSURANCE COMPANY, a foreign corporation,

Counterdefendant.

JUDGMENT

At a session of the Court held in and for said District and Division, in the City of Grand Rapids, Michigan, this 24th day of March, 1992.

PRESENT: HON. BENJAMIN F. GIBSON,
U.S. DISTRICT JUDGE

In accordance with the Opinion dated March 24, 1992, IT IS HEREBY ORDERED that plaintiff/counterdefendant New Hampshire Insurance Company's motion for summary judgment (pleading no. 57) is GRANTED.

IT IS FURTHER ORDERED that the insurance policy at issue is REFORMED to replace the liability symbol 2 with a liability symbol 7.

IT IS FURTHER ORDERED that defendants A. Luurtsema Truck Lines, Inc., *et al.*'s joint cross-motion for summary judgment (pleading no. 130) is DENIED.

IT IS FURTHER ORDERED that defendant/counterplaintiff Michigan Mutual Insurance Company's motion for summary judgment (pleading no. 134) is DENIED.

IT IS FURTHER ORDERED that any other pending motions are DENIED as MOOT.

IT IS SO ORDERED.

/s/ Benjamin F. Gibson
BENJAMIN F. GIBSON
U.S. DISTRICT JUDGE